UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIPCO TRANSPORT INC. Plaintiff, -against- JDB INTERNATIONAL INC. and LAPTON FREIGHT INTERNATIONAL LIMITED, Defendants.	09 cv 7532 (CM) ECF CASE

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DISCOVERY PROVIDED IN THE SCHEDULING ORDER

Defendant LAPTON FREIGHT INTERNATIONAL LIMITED (hereinafter "Lapton Freight Hong Kong") submits this Memorandum of Law in opposition to Plaintiff's SHIPCO TRANSPORT INC. (hereinafter "Shipco') Motion to Extend Discovery Provided in the Scheduling Order pursuant to Federal Rules of Civil Procedure 16(b)(4). For the foregoing reasons, Shipco's Motion should be denied.

On December 1, 2010, this Court issued a Scheduling Order which provided that all fact discovery by all parties was to be completed no later than December 10, 2010. *See Docket Entry No. 49.* On January 27, 2010, almost two months after the close of discovery, Shipco filed a motion seeking a 35 day extension of time to serve Defendant Lapton Freight Hong Kong with a second set of interrogatories, requests for production of documents, and requests for admission and allowing Lapton Freight Hong Kong additional time to respond. *See Plaintiff's Motion to Extend Discovery, Docket No. 53.* Shipco states that this Court "recommended additional discovery be served on Defendant Lapton" in its Order dated November 17, 2010. *Id.* Lapton

Freight Hong Kong respectfully disagrees with Shipco characterization that this Court recommended further discovery in its Order. Lapton Freight has fully and timely responded to all discovery propounded by Shipco, specifically Shipco's First Set of Interrogatories, Requests for Production, and Requests to Admit. The deadline for conducting discovery passed almost two months ago however Shipco failed to serve additional discovery or move for a timely extension before the expiration of the discovery period. Thus, Lapton Freight Honk Kong should not now be made to respond to additional discovery and it will be prejudiced by Shipco's lack of diligence and undue delay.

Federal Rules of Civil Procedure 16(b)(4) provides that "a schedule may be modified only for good cause and with the judge's consent." A finding of "good cause" depends on the diligence of the moving party to comply with the scheduling order. *See Parker v. Columbia Pictures Industries*, 204 F.3d 326, 340 (2d Cir. 2000); *see also Oppenheimer & Co. v. Metal Mgmt., Inc.,* No. 08-3697, 2009 U.S. Dist. LEXIS 71608, 2009 WL 2432729 at *3-4 (S.D.N.Y. July 31, 2009) (diligence is "primary consideration" in determining good cause, and not even lack of prejudice to opposing party can trump lack of good cause to amend). "[T]he movant must show that the deadlines [could not have been] reasonably met despite its diligence." *Lincoln v. Potter*, 418 F. Supp. 2d 443, 454 (S.D.N.Y. 2006). Although diligence is the primary consideration for the court when determining whether to extend a deadline, it is not, however, the only consideration. *Kassner v. 2nd Avenue Delicatessen Inc.,* 496 F. 3d 229, 244 (2d Cir. 2007). "The district court, in the exercise of discretion under Rule 16(b), also may consider other relevant factors including, in particular, whether allowing the amendment at this stage in the litigation will prejudice [the other party.]" *Id.*

Here, Shipco argues that the Court "recommended" further discovery in its November 17, 2010 Order. At this time, the discovery deadline was still about three weeks away. However, Shipco did not serve any discovery on Lapton Freight Hong Kong or move for an extension of time to serve further discovery within the time allowed. Shipco did not move to extend to discovery deadline until January 27, 2011. Shipco's only explanation for this delay is that there were not sufficient days from the Court's order of November 17, 2010 until the close of discovery on December 10, 2010 to prepare, serve and allows response to discovery. *See Plaintiff's Motion to Extend Discovery, page .2* This does not excuse its failure to serve discovery within the time allowed and/or seek a timely extension before close of discovery. Hence, Shipco has not demonstrated "due diligence." Shipco has offered no reasonable cause for failing to timely serve additional discovery within the time allowed for in the Scheduling Order or to timely move for an extension of time before expiration of the discovery period and thus its motion should be denied. *See Julian v. Town of Cheektowaga*, 2006 U.S. Dist. LEXIS 22371 (W.D.N.Y. April 21, 2006)(denying motion of time to extend time to complete discovery where party failed to timely conduct discovery or to timely move for an extension of time.)

Moreover, Lapton Freight will be severally prejudiced by Shipco's undue delay in seeking further discovery at this stage of the litigation. Granting Shicpo's motion would require Lapton Freight Hong Kong to expend significant time and resources and would significantly delay the resolution of this dispute. *See Block v. First Blood Assocs.*, 988 F. 2d 344, 350 (2d Cir. 1993)("In determining what constitutes 'prejudice,' we consider whether the assertion of the new [discovery] would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [and] (ii) significantly delay the resolution of the dispute.")

CONCLUSION

For the foregoing reasons, this Court should deny Shipco's Motion to Extend Discovery Provided for in the Scheduling Order.

Dated: January 28, 2011

LAPTON FREIGHT INTERNATIONAL, INC.

By: Anne C. LeVasseur

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AFFIRMATION OF SERVICE

I hereby certify that on January 28, 2010, a copy of the foregoing Memorandum in Opposition to Plaintiff's Motion to Extend Discovery was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

By: Anne C. LeVasseur

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